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No. 94-0399

FILED
OCT 24 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MADISON HOBLEY,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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37 pp

QUESTIONS PRESENTED

Whether this Court should undertake review of the decision of the Illinois Supreme Court in this case, when, at the second stage of the capital sentencing hearing, the stage at which the sentence was determined, the jury was fully instructed that in a multiple murder case the only alternative sentence to death was natural life imprisonment without parole, only alterable by executive clemency on the part of the governor.

Whether this Court should decline to review the decision of the Illinois Supreme Court in this case since there was no violation of *Brady v. Maryland* here, where the alleged fingerprint report was not shown to have existed, and where, even assuming that it had existed, the illinois Supreme Court properly decided the case on the basis of this Court's decisions in *Youngblood v. Arizona* and *California v. Trombetta*.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, the People of the State of Illinois, respectfully prays that this Honorable Court Deny the Petition for a Writ of Certiorari sought by the Petitioner in the instant case.

OPINION BELOW

The opinion of the Supreme Court of the State of Illinois in the instant case was filed on March 31, 1994, and is reported as *People v. Hobley*, 159 Ill. 2d 272, 637 N.E.2d 992 (1994). That court subsequently denied defendant's Petition for Rehearing on May 27, 1994.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Honorable Court under 28 U.S.C. 1257(a). However, the arguments presented by Petitioner supply no reason why this Court should undertake review of the decision of the Supreme Court of Illinois in the instant case. Here, at the second stage of the Illinois capital sentencing hearing, the stage of the hearing at which the jury must determine whether death is the appropriate penalty in this particular case, the jury was instructed that defendant, having been convicted of multiple murders, would be sentenced to natural life imprisonment without parole if he was not sentenced to death. Thus, the trial judge instructed the jury in complete conformity with this Court's holding in *Simmons v. South Carolina*, ___ U.S. ___ 114 S.Ct. 2187 (1994). Furthermore, contrary to Petitioner's position, not only is there nothing in the record to show that any concealment of evidence by the prosecution occurred in this case, there is nothing to show that the alleged evidence ever existed. Thus, this case is not governed by *Brady v. Maryland*, 373 U.S. 83 (1963), but by *Arizona v. Youngblood*, 488 U.S. 51

(1988), and *California v. Trumbetta*, 467 U.S. 479 (1984). (See Reasons For Denying The Writ, infra.) Thus no reason is presented why this Court should undertake review of the decision of the Supreme Court of Illinois in the present case. On the contrary, this Court should decline to review this case on Writ of Certiorari.

STATEMENT OF THE CASE

In his Petition, Hobley presents to this Court a fragmentary and argumentative summary of the facts in this case. Therefore, a summary of the case from its inception may be helpful here.

Madison Hobley was found guilty by a jury of the arson murders of seven persons, (R. 2513-2514), and also of aggravated arson. He was subsequently sentenced to death for the seven murders. All seven victims died in the early morning hours of January 6, 1987 in a fire which swept through a large apartment building located in Chicago, Illinois. At the time of the fire defendant lived with his wife and son in apartment 301 of that building, the apartment on the third floor closest to the front interior staircase. (R. 895-896, 970) The most extensive damage caused by the fire was at the front of the third floor, in the area of defendant's apartment. (R. 898-899) The persons who died in the fire included 24 year old Anita Hobley, defendant's wife, and 15 month old Phillip Hobley, defendant's son. (R. 1162-1164, 1199-1204) A number of other persons who were in the building at the time suffered serious, and in some cases permanent injuries.

On January 6, 1987, Andre Counsil lived less than a block from the building in which the fire occurred. (R. 774-775) Shortly after midnight, he drove to a nearby gasoline service station to visit his friend, Kenneth Stewart, who

was the attendant on duty at the time. As Mr. Counsil stood talking to his friend, he saw defendant enter the service station carrying a gasoline can. (R. 780-781) Defendant walked to the outside "booth" from which service was being rendered, asked the attendant for a dollar's worth of gasoline, then handed the attendant something. Mr. Counsel stated that the lighting conditions were excellent and that he saw defendant's full face in the bright lighting. (R. 782-783) He saw defendant go to a pump, fill the can, and walk away toward the building in which the fire shortly occurred. (R. 812-813)

Some thirty to forty five minutes later Mr. Counsil saw fire engines going by in the direction of his home, and left the service station. (R. 785) Discovering that the fire was at the nearby apartment building, he went there with several other people. There he again saw the defendant, standing about two houses West of the burning building, wearing the same clothing he had been wearing in the service station. (R. 787-788, 812-813)

The third time he saw the defendant was on a television newscast. Recognizing him as the man he had seen purchasing gasoline in a can shortly before the fire, Mr. Counsil telephoned the police and on the following day told them what he had seen. (R. 788-789)

The service station attendant also testified to the incident in which a man had purchased gasoline from him shortly before the fire, but was not able to positively identify the defendant, who he said looked like the man. (R. 1000-1008)

As a result of calls of 911, a large number of fire-fighters arrived on the scene. One of these was Peter LaMana of the Chicago Fire Department. (R. 952-953) After assisting in the rescue of a woman from the second floor and a man from the third, (R. 953-954), LaMana climbed a ladder and entered the third floor through the window from which the

man had been rescued. (R. 955) He went into the hallway and made his way to the front of the building until he reached apartment 301, the apartment occupied by defendant and his family. (R. 955-957) He found that the door to apartment 301 had been almost completely burned away, leaving only a small portion at the bottom which he kicked out of his way. (R. 955-956) Inside the apartment he saw smoke, but there appeared to be little actual fire damage. However, it was clear to him that the interior of the apartment had been subjected to intense heat. (R. 956) Just to the right of the living room window, he found the bodies of Anita and Phillip Hobley, defendant's wife and son. (R. 956, 970, 1199-1202) The firefighter noted while in the apartment that there was a strong odor of gasoline. (R. 961)

Chicago firefighter David Lamb arrived to find a great deal of smoke coming from the third floor at the front of the building. (R. 916-918) In front of the building he saw the bodies of several persons covered with blankets and, as he arrived on the scene, he himself saw a woman jump from the burning building and fall to the pavement. (R. 918-919) He and his companions found both the outer and inner front doors to the building locked, so that they had to force their way inside. (R. 191-920) Once in the inner hallway, he discovered that the stairway leading to the upper floors was in flames. He attempted to bring this fire under control for some 20 minutes, but eventually the staircase collapsed. (R. 920-924) As he worked, the firefighter smelled the clearly recognizable odor of gasoline coming from the burning stairwell. (R. 922-923)

Louis Casa, the manager of the building in question, testified that apartment 301 had been rented by Madison Hobley on November 12, 1986. (R. 900) A woman named Angela McDaniels moved into the apartment at the time, and it was Mr. Casa's understanding that she and Hobley

were living together in the apartment. He was not aware that at some time between November 12, 1986 and the day of the fire McDaniels had moved out and defendant had moved his wife and son into the building. (R. 900-901)

A number of professional fire investigators from the Chicago Police and Fire Departments conducted investigations to determine the cause of this fire. One of them was Fire Marshall Francis Burns. (R. 1059) His investigation revealed that the heaviest damage seen from the outside of the building appeared to be on the west front of the third floor. He discovered that the inside front staircase had collapsed (R. 1068-1069), and he determined that on the lower levels of the building the fire had been almost completely confined to the stairwell. (R. 1072-1076) The hardwood of the stairway risers and steps had been burned through. This was highly unusual and indicated a fire of such intense heat that it immediately suggested to him that gasoline or some other liquid accelerant had been used to start the fire. (R. 1076-1077) The burn patterns on the landings and under the landings indicated that a liquid accelerant had been poured on the stairway. (R. 1079-1082) He concluded that the liquid accelerant had been poured on the stairway and then an open flame had been set to it. (R. 1093-1096)

The front door to apartment 301 was burned away, that door having suffered the most damage of any door in the building. (R. 1112) This indicated to the investigator that gasoline had been poured on the floor in front of the door to the apartment, that it had pooled there and soaked into the floor, and that it had leaked under the door into the apartment. (R. 1112-1113)

Virgil Mikus, a police fire investigator, also concluded that the fire was started by pouring gasoline on the floor outside of apartment 301. (R. 1212-1215, 1238-1239) When

debris was later cleared from in front of the door, he discovered a circular burn pattern outside the door some four to six feet across. (R. 1215-1216) It extended into the apartment where the liquid had leaked under the door, and it extended down the stairway where the liquid had been poured down the stairs. His conclusion was that the fire was deliberately started by someone pouring gasoline outside the door of apartment 301 and then down the stairway where it was ignited.

Considerable testimony was presented concerning homicide investigation of this fire. Investigators spoke to many persons, including defendant and his "girlfriend," Angela McDaniels. The culmination of this investigation was that, after being advised of his rights and taking a lie test, defendant was told by Sgt. Patrick Garriey that the officer believed that defendant had started the fire. (R. 1131-1132) Hobley then told Sgt. Garriey that on the night of the fire he had taken a gasoline can, gone to a nearby service station on Cottage Grove Avenue, purchased some gasoline, and returned to the apartment building. (R. 1133) He splashed gasoline outside of the door of his apartment, then splashed it down the stairs, ignited it and left the building. (R. 1133-1134) He said that he did this because he was having a great deal of trouble with his girlfriend and his wife.

Shortly, investigating detectives arrived and Detective Robert Dwyer had another conversation with the defendant. Once again defendant was advised of his rights, and once again he stated that he understood them. (R. 1393-1397) Hobley then said he would speak to Dwyer. Dwyer told him that he had spoken to Angela McDaniels (the woman he had lived with for a time in apartment 301), that she was at the police station, and that the service station attendant was on his way to the police station. (R. 1398) Defendant

then once again stated that he had gone to a gasoline service station a few blocks from the apartment building, filled a can with gasoline, and taken it back to the apartment building. (R. 1398-1399) He poured gasoline outside the door of the apartment where his wife and son were, then down the stairway where he ignited it and left the building. (R. 1399) He said that he could not handle his wife anymore, and that Angela McDaniels was "where he wanted to be in his future." (R. 1400)

In his own behalf, defendant testified that in 1986 he, his wife, and his small son lived in an apartment on South Michigan Avenue in Chicago. (R. 1837) In October of that year he met a woman named Angela McDaniels at a party, began seeing her, and subsequently had an affair with her. (R. 1837-1840) In the first week in November, 1986 McDaniels moved into apartment 301 in the building which was subsequently burned, this apartment rented for her by defendant who said he did not move in but that he "stayed with" McDaniels there. (R. 1841-1842) His wife Anita found out about the affair, demanded that he break it off and, upon discovering that he had not done so, told him to move out and go live with McDaniels. (R. 1842-1844) This he did for a time. Defendant stated that he reconciled with his wife on Thanksgiving day, that shortly thereafter McDaniels moved out of the apartment, and in December 1986 he moved his wife and son into the apartment. (R. 1845-1847)

He testified that on December 31, 1986, a small fire occurred on the landing outside the door of his apartment. He stated that he thought McDaniels might have started it. (R. 1848-1853)

On the day of the fire here in question, January 6, 1987, he testified that he was awakened by the sound of a smoke alarm, and woke his wife. (R. 1865-1866) Hobley told the

jury that he went out into the hallway and down the hall a short distance, that he then discovered flames coming out of the stairwell and toward the open door of his apartment, that he was unable to get back to the apartment, and that he bent low and exited the building through a rear door. (R. 1865-1888)

John Campbell, a defense expert witness, testified that he had not visited the fire scene nor spoken to anyone who had been in the fire. (R. 2178-2182, 2216-2218) He concluded from examination of photographs and reports that in his opinion the fire had been started in the stairwell but that there had been no gasoline poured on the door of apartment 301 or on the hallway floor outside the door. (R. 2179-2184)

At the close of the voluminous evidence in this case, defendant was found guilty of the seven arson murders. (R. 2513-2517) A bifurcated Illinois capital sentencing hearing was then conducted. At the first stage of that hearing defendant was found eligible to receive the death penalty. (R. 2543-2579)

At the second stage of the capital sentencing hearing, the stage at which the jury had to determine if death was an appropriate sentence, Patricia Phiefer testified for the People that she had been a friend of Anita Hobley. (R. 2600-2601) In late November, 1986, she was called by her friend to the Hobley apartment, which was then on South Michigan Avenue. (R. 2603-2604) She found Anita Hobley alone, and was told that defendant had "abducted" little Phillip. (R. 2604-2605) Mrs. Hobley told her that she and defendant had been having marital problems. Ms. Phiefer took Anita Hobley home with her that evening. (R. 2605-2606)

On the following morning, defendant called the Phiefer apartment four times demanding to speak to his wife. (R. 2606-2608) Each time Mrs. Hobley refused to speak to him,

and each time Ms. Phiefer relayed that message to defendant. (R. 2607-2608) At about 1:30 that afternoon, a brick was thrown through Mrs. Phiefer's living-room window. (R. 2608-2609) Ms. Phiefer called the police who arrived in a few minutes. As she was speaking to the officers the telephone rang. (R. 2609) She asked the officers to pick up one extension while she picked up another. The call was from Madison Hobley. (R. 2610) Defendant asked if now she would let him speak to his wife and she replied that she would not. She thanked him for breaking her window, and he told her that she was welcome. (R. 2610) Defendant then told her that this was not all that was going to happen, that he was going to burn down the apartment building in which she lived. (R. 2611) This was corroborated by the police officer who listened to the call on the extension telephone. (R. 2620-2624) The officer had transcribed the conversation in his notebook. (R. 2624-2625) Following the fire in which the seven victims in this case were killed, this officer prepared a memorandum concerning the defendant and the incident at the Phiefer apartment. (R. 2625-2632)

Although a pre-sentence report showed that defendant had been convicted of theft in 1981, and unlawful use of a weapon in 1982, the judge ruled that neither of these convictions could be presented to the jury.

For the defense at the second stage of the sentencing hearing, a large number of witnesses testified to defendant's character, and concerning his work as a person who delivered home medical equipment to the elderly and instructed them in its use. (R. 2645-2761)

At the conclusion of this hearing, defendant was sentenced to death. (R. 2836)

REASONS FOR DENYING THE WRIT

I.

THIS HONORABLE COURT SHOULD DECLINE TO UNDERTAKE REVIEW ON CERTIORARI OF THE DECISION OF THE ILLINOIS SUPREME COURT IN THE INSTANT CASE SINCE AT THE SECOND STAGE OF THE ILLINOIS BIFURCATED SENTENCING HEARING, THE STAGE AT WHICH THE JURY MUST DETERMINE IF DEATH IS AN APPROPRIATE SENTENCE IN THIS PARTICULAR CASE, THE JURY WAS INSTRUCTED THAT DEFENDANT, HAVING BEEN FOUND GUILTY OF MULTIPLE MURDERS, WOULD BE SENTENCED TO NATURAL LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE IF THE JURY DID NOT SENTENCE HIM TO DEATH. THE HOLDING OF THE ILLINOIS SUPREME COURT FINDING THE JURY TO HAVE BEEN PROPERLY INSTRUCTED IS IN COMPLETE CONFORMITY WITH DECISIONS OF THIS COURT.

Petitioner raises two arguments before this Court in seeking Certiorari. The first of these alleges that the jury was not properly instructed at the capital sentencing hearing. The Illinois Supreme Court found here that the jury, at the second stage of the capital sentencing hearing, was properly instructed. *People v. Hobley*, 159 Ill. 2d 272, 318, 637 N.E.2d 992 (1994). A consideration of what took place at the sentencing hearing, and of applicable Illinois law, shows clearly that the jury was properly and completely instructed, and that the proceeding was in complete conformity with guidelines set out by this Court. Therefore, Petitioner's argument presents no reason why this Court should undertake to review the decision of the Supreme Court of Illinois in this case.

In Illinois, the capital sentencing hearing is divided into two parts. At the first stage of this proceeding, the eligibility stage, the jury is concerned only with whether defendant is eligible to receive the death penalty. See, Illinois Pattern

Jury Instructions, Criminal, §§7B.00 through 7B.12 (3rd Ed. 1992). In the instant case the only determination for the jury at this stage of the proceeding was whether the defendant had been convicted of the seven murders here in question and whether he was 18 years of age or older at the time he committed the murders. At the second stage of the sentencing proceeding, the jury is presented with aggravation and mitigation, and it is at this juncture that the question before the jury is whether death is the appropriate sentence under all of the facts and circumstances of this particular case. See, Illinois Pattern Jury Instructions, Criminal, §§ 7C.01-7C.09a (3rd Ed. 1992). This is in conformity with the holding of the Illinois Supreme Court that such a bifurcated hearing is preferable in capital cases. *People v. Albanese*, 104 Ill. 2d 504, 473 N.E.2d 1246 (1984). It is at this second stage of the Illinois capital sentencing hearing that the jury determines the question of sentencing, whether death is an appropriate sentence in this particular case. It is at this stage of the hearing that the admonition of this Court in *Woodson v. North Carolina*, 428 U.S. 280, 304 (1986), must be followed, to the end that a complete consideration of every aspect of defendant as an individual must be taken into account. It was at this stage of the proceeding that the jury had to be fully advised as to any possible sentencing alternatives to the death penalty.

Nevertheless, during the first stage of the hearing, the eligibility stage, defendant sought to have the jury instructed that under Illinois law in a case such as this one dealing with multiple murders the only sentencing alternative to death was natural life imprisonment. The judge refused the instruction as inappropriate at that juncture. (R. 2523-2525) The jury was instructed, among other matters, that if it could not unanimously agree that defendant was eligible for the death penalty, a term of imprisonment would be imposed. However, at the second stage of the pro-

ceeding, the actual sentencing stage, the jury was fully instructed that the only alternative to the death penalty in this case was a sentence of life imprisonment without possibility of parole which could be commuted only by clemency from the governor of the state. (R. 2832) The defendant contended on appeal that he was entitled to that instruction at the eligibility stage of the sentencing hearing. The Illinois Supreme Court rejected this argument and found that the jury had been properly instructed. *People v. Hobley*, 159 Ill. 2d 272, 318, 632 N.E.2d 992 (1994). In so holding the Court followed established Illinois precedent which is in complete conformity with the holdings of this Court.

In *People v. Gacho*, 122 Ill. 2d 221, 522 N.E.2d 1146 (1988), the Illinois Supreme Court held that in cases involving multiple murders the jury must be instructed, at the second stage of the capital sentencing hearing that the only alternative to the death penalty is natural life imprisonment without possibility of parole, which may be altered only by executive clemency on the part of the state governor. This was the instruction given in the instant case. Subsequently, in *People v. Lear*, 143 Ill. 2d 138, 151, 572 N.E.2d 876 (1991), the court rejected the precise argument which was again made before it by defendant in the instant case. The court concluded (143 Ill. 2d at 151):

> "The defendant argues that the trial court erred in refusing to instruct the jury at the first stage of the sentencing hearing that the only alternative to death was natural life imprisonment. We find no merit in defendant's claim. This Court has held that at the first stage of a sentencing hearing a trial judge need not inform the jury of the particulars of the sentencing alternative that would be imposed should the defendant be found ineligible for death. [Citation.] This is because at the first phase of the sentencing hearing, the jury is concerned solely with the threshold question of whether

> defendant is even eligible for death. Only at the second phase of the hearing do actual sentencing determinations arise."

Therefore, in this case, and in any Illinois case involving multiple murders, at the stage of the proceeding at which the jury must make the actual sentencing determination they are instructed that the only alternative to death is a natural life sentence. Furthermore, that term is defined for them as indicating that defendant is ineligible for parole, but can be released only through clemency on the part of the governor of the state. This last provision is in recognition of this Court's statement that a full definition of the term natural life imprisonment without parole must tell the jury of the possibility of executive clemency. *California v. Ramos*, 463 U.S. 992 (1983). The instruction here given at the stage of the proceeding in which actual sentencing determinations were being made is in complete conformity with the decisions of this Court.

Petitioner relies almost entirely on the holding of this Court in *Simmons v. South Carolina*, ___ U.S. ___ 114 S.Ct. 2187 (1994). There, in a capital case, the future dangerousness of defendant was called into question by prosecution argument to the jury. At the sentencing proceeding at which the determination was to be made whether death was the appropriate penalty, defendant wished the jury to be instructed that life imprisonment meant that defendant could not be paroled. The rejection of this instruction was found error. This Court held that, at least in instances where the future dangerousness of defendant is called into question, such an instruction should be given so that the jury was fully informed of the alternatives to the death penalty and would not be laboring under the false impression that defendant might leave prison if he were not sentenced to death. Justices Souter, Blackmun and Stevens expressed concerns that jurors might be mislead by the

term life imprisonment, and might believe that defendant could be paroled or otherwise set free. Justice Souter in a concurring opinion stated that under the Eighth Amendment the defendant had a right to have the term defined in such a case to indicate his ineligibility for parole. This the Court found was in conformity with the requirement of the highest reliability in death penalty verdicts.

These problems obviously do not arise in the present case. In this case, the jury was informed, at the stage of the proceeding at which they were determining the sentence, that the only alternative to death was a sentence of natural life, and they were informed of exactly what that meant. No juror could have thought defendant eligible for parole, thus this misunderstanding which was a possibility in *Simmons*, could not arise here.

Petitioner seeks to apply the thinking in *Simmons* to the first stage of the sentencing hearing, the eligibility stage. Petitioner blurs the distinction between the first and second stages of the bifurcated hearing, saying that the failure of the judge to give this instruction at the first stage might have resulted in a juror imposing the death penalty rather than risk one day of freedom for the defendant. (Hobley's Petition, P. 11.) But at the first stage of the proceeding the jurors were not voting as to whether death should be imposed. They were deciding the narrow question of whether defendant was eligible for the death penalty. What they had to decide at this point was whether defendant had been convicted of more than one murder (in fact they had convicted him of seven), and whether defendant at the time of those murders was 18 years of age or over. It is simply unsupported speculation to say, as does Petitioner, that under these circumstances a juror who thought defendant ineligible for the death penalty might vote to find him eligible because he or she felt that otherwise defendant

might someday get out of prison. The point here is that the jury was fully and properly instructed at the stage of the proceeding when they were considering whether to impose the death penalty, and they were made aware of exactly what sentencing alternatives existed. Therefore, the decision of this Court in *Simmons v. South Carolina*, *supra*, does not support Petitioner's position. Quite the contrary, the situation here is one which under *Simmons* poses no threat of an improperly informed jury imposing a death sentence. This Court's demand for the highest degree of reliability in death sentencing cases was more than met here. *Mills v. Maryland*, 486 U.S. 367 (1988).

In light of all of the above, it is clear that no reason exists for this Court to undertake review of the decision of the Illinois Supreme Court in this case that the jury was properly instructed at the capital sentencing hearing. Therefore, the People respectfully pray that this Court deny Certiorari in this case.

II.

THIS HONORABLE COURT SHOULD DECLINE TO REVIEW ON CERTIORARI THE DECISION OF THE ILLINOIS SUPREME COURT IN THIS CASE FINDING THAT NO VIOLATION OF *BRADY v. MARYLAND* OCCURRED AND THAT NO EVIDENCE WAS INTENTIONALLY CONCEALED FROM DEFENDANT SINCE THAT DECISION IS COMPLETELY SUPPORTED BY THE RECORD AND IS IN CONFORMITY WITH DECISIONS OF THIS COURT. THE ALLEGED FINGERPRINT REPORT WAS NOT SHOWN TO HAVE EXISTED OR TO HAVE BEEN IN THE POSSESSION AND CONTROL OF THE PROSECUTION; IT WAS NOT SHOWN THAT THE EVIDENCE ALLEGEDLY WITHHELD WAS FAVORABLE TO THE DEFENDANT; AND IT WAS NOT SHOWN TO HAVE BEEN MATERIAL IN THAT, HAD IT BEEN AVAILABLE TO THE DEFENSE, THERE WAS A REASONABLE PROBABILITY THAT THE OUTCOME OF THE TRIAL WOULD HAVE BEEN DIFFERENT.

Petitioner states under his second argument that a fingerprint report involving a gasoline can found in the burned out building after the fire was intentionally withheld from him by the prosecution in violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This simply is not true and is not born out by the record, as the Illinois Supreme Court found in its decision in this case. *People v. Hobley*, 159 Ill. 2d 272, 306-308, 637 N.E.2d 992 (1994). The determination of that court that no *Brady* violation occurred and that defendant's rights were not violated is supported by the record and is in complete conformity with decisions of this Court. Therefore, once again Petitioner presents no reason why this Court should undertake to review the well-reasoned decision of the Supreme Court of Illinois.

In its opinion, the Illinois Supreme Court found that the *Brady* decision was inapplicable; that there was no showing that the alleged fingerprint report existed; and that, assuming its existence, there was no bad faith shown on the part of the prosecution as required by this Court in decisions

such as *Arizona v. Youngblood*, 488 U.S. 51 (1988). Moreover, the court noted that there was overwhelming evidence of defendant's guilt apart from any evidence dealing with a gasoline can found on the building's second floor. Therefore, Petitioner's statement to this Court that the can was the "linchpin" of the prosecution's case is simply not true. Clearly no intentional withholding of evidence occurred here. In fact, there was not even a showing by the defense that the alleged fingerprint report ever existed.

Brady v. Maryland, supra, imposes a duty on the prosecution to disclose exculpatory evidence in its possession and control to the defendant upon defendant's specific request or, in the absence of such a request, to turn over to defendant evidence so clearly supporting a claim of innocence that in itself it gives notice to the prosecution that it should be produced. *United States v. Agurs*, 427 U.S. 97, 111 (1976). To demonstrate a violation of the *Brady* rule, defendant must show that exculpatory evidence in the possession and control of the prosecution was withheld from him, and that the evidence was material in the sense that, had it been revealed to the defense at trial, there is a reasonable probability that the outcome of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 674 (1985); *People v. Harris*, 129 Ill. 2d 123, 152, 544 N.E.2d 357 (1989). When there has been no showing that evidence favorable to the defendant has been withheld or no showing that the evidence is material in the *Brady* sense, there is no violation of defendant's rights. *Brady v. Maryland, supra*; *People v. Olinger*, 112 Ill. 2d 324, 342, 493 N.E.2d 579 (1986). Of course, the evidence must be shown to actually exist and to be within the possession and control of the prosecution. *People v. Sims*, 166 Ill. App. 3d 289, 309, 519 N.E.2d 921 (1st Dist. 1987); *People v. Morgan*, 149 Ill. App. 3d 733, 741, 500 N.E.2d 1121 (4th Dist. 1986). Defendant cannot claim concealment of evidence of which the prosecu-

tion had no knowledge at the time of the trial. *People v. Kline*, 92 Ill. 2d 490, 502, 452 N.E.2d 743 (1982).

In this case, defendant alleged in a motion for mistrial that a fingerprint report concerning a gasoline can found on the second floor of the burned out building had not been turned over to him. (R. 2282-2284) But there was no showing made that the alleged report was favorable to the defendant, much less that there was a reasonable probability that it would have altered the outcome of the trial. In fact, not only was there nothing shown as to what this alleged report might have contained, there was in fact no showing that any such report actually existed, and valid reasons for believing that it did not.

Petitioner's assertion that such a report ever existed is based on the testimony of Chicago Police Officer John Paladino. (R. 1513-1533) In one of defendant's confessions to the police, in which he admitted setting the fire and responsibility for the deaths of seven persons because he wished to rid himself of his wife and child so that he might be with his mistress, defendant had mentioned that he threw the can of gasoline he had on the second floor of the building as he fled. In light of the fact that the building had four floors, three above street level, this statement is vague, as to what he meant by second floor. However, Officer Paladino was dispatched to the second floor of the fire scene and there recovered a gasoline can from inside apartment 206. It was stipulated that chemical tests of the can showed its contents to have been gasoline. (R. 611-612) The can was before the jury for the inspection of its members. During direct examination by the prosecution, Paladino was asked if the black soot had been on the can when he recovered it. (R. 1525) He replied that he believed that the substance was fingerprint powder. He then said that the can had been taken to the crime laboratory for fingerprint testing. (R.

1525) On cross-examination, Paladino stated that he assumed the substance on the can was fingerprint powder. (R. 1529)

On the basis of nothing more than the police officer's assumption as to what the black substance on the can might have been, defendant subsequently moved for a mistrial. He contended that the prosecution had withheld evidence favorable to the defendant, a supposed fingerprint report which was allegedly made at the crime laboratory. (R. 2282-2283) One of the prosecutors then stated that he had never seen such a report and that there was no such report. (R. 2283) Although having no duty to do so, *United States v. Agurs*, *supra*; the prosecutor then opened his entire file to the defense and went through all of the documents in the file with defense counsel. (R. 2283) In particular, he had shown defense counsel all crime laboratory reports dealing with this case. No fingerprint report was to be found. The Assistant State's Attorney also pointed out that it was doubtful whether Officer Paladino's surmise that the substance on the can was fingerprint powder had any basis in fact. (R. 2284) At the end of this discussion, the trial judge denied the motion for a new trial. (R. 2284)

Thus, the only ground for Petitioner's assumption that any such report ever existed was the assumption of Paladino that the substance on the can was fingerprint powder. Yet it is quite clear that the prosecution had no such report and had made its file available to defense counsel to prove that fact. It is also clear from the question asked Paladino by the prosecutor (R. 1525), that the prosecution has assumed the dark substance on the can to be soot of some kind and had not entertained the notion that it might be fingerprint powder. Certainly a prosecutor who was attempting to conceal a fingerprint report would not ask such a question, risking the possibility that the ques-

tion of fingerprint powder might arise. The asking of this question, and the prosecutor's subsequent opening of his entire file to the defense, is persuasive evidence that the prosecution had no such report in its possession and control. Certainly there is no basis for petitioner's assumption that the prosecutor lied and got away with it. There has been no showing here that any such report existed, or even that the can was ever tested for fingerprints. Without this threshold showing, certainly no argument for a *Brady* violation can be made. If any logical assumption might be drawn from the non-existence of the report, it would appear to be that the can was not tested for fingerprints. Yet, the assumption runs throughout Petitioner's argument here that the fact that the report was not produced indicates that it must have been favorable to the defendant. As has been shown above, under the rule fashioned by this Court in *Brady v. Maryland*, evidence need be turned over to a defendant only if it is shown to be favorable to the defendant, and it is material in the sense that it might well have altered the outcome of the trial. Yet, under the assumption made by the Petitioner, any item of evidence not turned over to defendant would be presumed favorable to the defense until proven otherwise. This result was certainly never contemplated by the *Brady* decision.

In the present case, as will be seen in a moment, the Illinois Supreme Court found the *Brady* decision inapplicable and determined the issue presented on the basis that, even assuming the report existed in the first instance, it would have to be treated as lost or unpreserved evidence. As that court noted with regard to the assumption made by Petitioner, a defendant should not be rewarded for the inadvertent loss of evidence. The court determined that in a case such as this one, in which it was not clear that any report existed or what its content might be, analysis under

the *Brady* rule was inappropriate. *People v. Hobley*, *supra*, at 307.

In an apparent effort to convince this Court that the *Brady* rule should apply, Petitioner quotes out of context one phrase used by the prosecution in rebuttal closing argument at the second stage of the capital sentencing hearing, and states that this shows not only that the report existed, but that it was favorable to the defense.

Petitioner would have this Court take out of context one clause of one sentence uttered by a prosecutor during closing argument at sentencing, and elevate it to the status of a full confession that the prosecution had lied in saying that the fingerprint report did not exist, and that the contents of the report showed that defendant's fingerprints were not found on the gasoline can. But the remark, seen in context, is obviously nothing more than a piece of rhetoric, and was apparently seen as such by alert defense trial counsel who did not object to it at the time it was made, and did not ask the trial judge to reopen the question of the alleged fingerprint report on the basis of the remark. The failure to object here shows much more than a waiver of the argument before the Illinois Supreme Court, see *People v. Franklin*, 135 Ill. 2d 78, 100, 552 N.E.2d 743 (1990); it shows that to the people in the courtroom at the time the comment was made it clearly was simply rhetoric and was in no way construed as an admission that the supposed fingerprint report had ever existed.

In his rebuttal closing argument to the jury at the final stage of the sentencing hearing, the prosecutor argued that the good character testimony presented as to defendant was not sufficient to preclude imposition of the death penalty, and that what kind of person the defendant really was had been shown by the evidence presented by the prosecution at trial, and the evidence at sentencing that defendant had

also threatened to burn down the apartment of Patricia Phiefer. (R. 2808-2818) The prosecutor then said he did not know what else he could have shown to the jury to prove what sort of person Madison Hobley really was. He then stated (R. 2818); "He didn't give us a videotape of the crime. He chose not to leave his fingerprints anywhere on that can. He chose what the evidence would be, and we brought you evidence that tells you how Madison Hobley likes to solve disputes." The obvious purport of the argument was that the People had shown the jury what kind of man Hobley was, that there was nothing else they could have shown, and that what they had shown was enough to prove defendant not the kind loving person pictured by defense character witnesses. The phrase about his leaving no fingerprints on the can was rhetorical, it simply said that the prosecution had presented no fingerprint evidence. Certainly it was not an admission that a fingerprint report favorable to the defendant existed and that the prosecution had withheld it. It makes no more sense to construe this phrase in the way in which the Petitioner would have this Court do than it does to say that the argument indicates that the prosecution had a videotape of the crime which it withheld. The argument, seen as a whole, is simply that the prosecution presented enough evidence to show defendant a person deserving of the death penalty.

The Petitioner would take this one phrase in one sentence in closing argument out of context, and amplify it into an admission that a fingerprint report favorable to him existed. Petitioner would have this Court ignore the clear statement at trial by the prosecutor that no such report existed, and the good faith shown by the prosecutor in opening his entire file for defense inspection. He would have this Court ignore the question asked by the prosecutor about soot on the can which clearly showed that the prosecutor had never considered the question of the can having

been fingerprinted. But, more than this, he would build out of sheer speculation on this phrase either a showing under the *Brady* decision that evidence favorable to the defendant was deliberately withheld, or he would have an assumption drawn that the prosecution acted in bad faith, as opposed to the conclusion of the Supreme Court of Illinois drawn from the record that the prosecution had not so acted. Certainly, one may ask the common sense question of why a prosecutor, having allegedly gone to the trouble of concealing the evidence, would blurt out the fact that he had done so in open court.

Petitioner would have this Court act on his interpretation of the comment to grant Certiorari. One may presume that, were Certiorari granted, he would then use the same speculation to try to show this Court that the fingerprint report had existed and was favorable to him. But as has been shown above, the record clearly supports the finding of the Illinois Supreme Court that no showing of a violation of the *Brady* decision occurred here and that no bad faith on the part of the prosecution had occurred. Were Petitioner's reasoning followed to its ultimate end, regardless of the clear and well-reasoned opinion of the Illinois Supreme Court, regardless of the denial by the prosecution that any such report existed, and regardless of the fact that the prosecution's file had been readily opened to the defense, this comment, taken out of context, would create a presumption of the existence of a report favorable to the defense in this case.

Almost certainly in any lengthy criminal trial, remarks may be made in the rhetoric of closing argument which could be taken out of context as this remark has been. But such a ploy should not influence this Court to grant Certiorari when the record as a whole clearly supports the decision of the Illinois Supreme Court, when that decision

is in conformity with decisions of this Court, and when the speculation stands alone, unsupported by anything else in the record. The comment here in question, seen in context, was not that defendant's fingerprints had not been found on the can. It was a comment that the prosecution had shown the jury at the death penalty hearing what sort of man defendant really was, and the prosecutor did not know what other proof the People might have offered. The worst that might be said of the prosecutor is that his choice of this particular phrase was, in hindsight, unfortunate. But to interpret the phrase as an admission of the existence of the alleged fingerprint report makes no sense. It would dispense with defendant's need to show the existence of favorable and material evidence under the *Brady* decision and it would eliminate the showing of bad faith required by *Arizona v. Youngblood*, 488 U.S. 51 (1988), relied upon by the Illinois Supreme Court and discussed below.

In light of the record here and its clear showing that no report existed or, even if it ever had, that it had not been in the possession or control of the prosecution, no such speculation as that indulged in by Petitioner here could supply any reason for this Court to grant Certiorari to review the decision of the Illinois Supreme Court.

Having found *Brady* inapplicable, the Illinois Supreme Court analyzed the instant case under this Court's decisions dealing with lost or unpreserved evidence. That court concluded that no bad faith on the part of the prosecution had been shown here and that overwhelming evidence of guilt existed quite independently of any evidence having to do with the gasoline can. *People v. Hobley*, *supra*, at 307-308. Under the facts of this case, this holding was clearly correct.

In *Arizona v. Youngblood*, 488 U.S. 51 (1988); and *California v. Trombetta*, 467 U.S. 479 (1984); this Court dealt

with the question of lost or unpreserved property. Reiterating that the *Brady* rule deals only with those instances in which evidence favorable to the defendant has been withheld and that evidence is material to the extent that it might well have effected the outcome of the trial, these decisions find the *Brady* rationale not applicable to cases involving lost or unpreserved property. Noting that in the case of lost or unpreserved property the Court could say no more than that the evidence might possibly have been favorable to the defense, this Court determined that in such instances the test to be applied was whether the prosecution or police acted in bad faith in destroying the evidence, thus giving rise to the assumption that the evidence might at least have had some exculpating quality. This is obviously a completely different test than that in *Brady*, and it is the test correctly applied to this case by the Illinois Supreme Court.

In the instant case, there is not the slightest indication of bad faith. There is not even any showing here that the alleged report ever existed. But assuming that it ever did and was lost, it is clear that it was never in the possession and control of the prosecution. Petitioner, who assumes the report once existed, seeks to find bad faith in the fact that such routine reports should be preserved. But were this the standard, the requirement of a showing of bad faith would disappear from the *Youngblood* and *Trombetta* decisions, replaced with an assumption that such evidence was favorable to the defense.

Furthermore, Petitioner's attempt to distinguish this Court's *Youngblood* decision on its facts results in nothing more than a distinction without a difference. In *Youngblood*, the failure of police to keep the sexual crime victim's clothing refrigerated resulted in it being useless for semen testing. Petitioner states that the evidence was offered to

the defense but not accepted for testing and that other samples were available, thus trying to distinguish *Youngblood* from the instant case. However, the other samples were those taken from defendant. Expert witnesses testified, as this Court noted in its opinion, that a defense favorable result in semen testing might well have resulted in defendant being exonerated; certainly a more vital piece of evidence than the alleged fingerprint report here. The defense attorney had refused to test the clothing simply because it was obvious that no useful results could be obtained.

The point here is that the rule established by the *Youngblood* and *Trombetta* decisions is clear, that in the case of lost or unpreserved evidence the question is whether the prosecution acted in bad faith. This standard was properly applied to the instant case by the Illinois Supreme Court assuming, as that court said, that any such report had ever existed. No concealment or bad faith was shown here when the question asked by the prosecutor showed that he was aware of no such report, and where he opened his entire file for defense inspection. What is presented here is a clear instance of complete candor on the part of the prosecution. Thus, defendant's citation to the case of *People v. Flowers*, 51 Ill. 2d 25, 281 N.E.2d 299 (1972), as "strikingly similar" (Petition, p. 15) is not in point. That case concerned a charge of indecent liberties with a four year old girl. Defendant requested results of chemical tests on the child's clothing, but was told only that such tests had been requested. Under the facts of that case, the Illinois Supreme Court in effect found bad faith on the part of the prosecution since, the court stated, a candid reply had not been forthcoming. The prosecution there should have produced the tests, said they did not exist, or indicated they were lost. In the present case, the prosecution stated that no fingerprint report existed and candidly opened its file to the defense.

Again we note that it is clear here that no such report was in the possession of the prosecution in this case.

Nor is Petitioner correct in saying that the Illinois Supreme Court overlooked its decision in *People v. Nichols*, 63 Ill. 2d 443, 349 N.E.2d 40 (1976), in deciding this case. *Nichols* is completely inapplicable here. In that case a shoe was found near a window through which burglars had probably made entry, and near a palm print which was not that of the defendant. Defendant requested the shoe and the trial court ordered the prosecution to produce it, but it was not produced. In that case the court found what amounted to a *Brady* violation. Here, as the Illinois Supreme Court found, there was no *Brady* violation. This case was correctly decided by that court under *Arizona v. Youngblood*, *supra*; and *California v. Trombetta*, *supra*.

Petitioner cites *United States v. Bryant*, 439 F.2d 642 (D.C. Cir. 1971), but clearly that case has no applicability here. The *Bryant* decision, decided years before this Court's decisions in the *Youngblood* and *Trombetta* cases, attempted incorrectly to apply the *Brady v. Maryland* analysis to an instance of lost or unpreserved property. In light of subsequent decisions of this Honorable Court, clearly this case would today be considered as having been wrongly decided.

At pages 19 and 20 of his Petition, Petitioner suggests that this Court reconsider the bad faith rule established in the *Youngblood* and *Trombetta* decisions. The rule Petitioner would substitute would require a jury instruction that lost or unpreserved evidence should be presumed to have been favorable to the defendant. This is the rule rejected by this Court in its cases on point here, and there is no reason why this Court should reconsider that rule based on the facts of this case. The rule opted for by the Petitioner would eliminate the bad faith test, would ignore this Court's finding that in the case of lost or unpreserved property the

most that could be said is that the evidence might have been favorable to defendant, and would make a legal presumption that the evidence was favorable. Prior decisions of this Court such as *Youngblood* have clearly shown the Court's rejection of this position. Again, no reason is presented for the granting of Certiorari here.

Finally, Petitioner suggests that the cause should be remanded so that the defense may argue to the jury that the failure to preserve the report shows it was favorable to defendant, and that this could be evaluated by the jury in connection with the testimony of a defense expert as to the condition of the gasoline can. (Petition, at 23) As has been shown, this Court rejects the presumption which Petitioner would draw from the alleged report not being preserved. Furthermore, in this case, such an argument would be even more inappropriate since no showing that the report ever existed has been made and it is quite clear that the report was never in the possession and control of the prosecution.

The defense expert, Campbell, testified concerning the gasoline can, being limited by the court only to the extent that he was not allowed to speculate as to where in the second floor hallway the can might or might not have been at the time of the fire. The judge would permit him to testify that the can did not appear to have been subjected to great heat or smoke. The can itself was before the jury, who could see that it had apparently not been subjected to great heat or smoke. (R. 1532) On cross-examination of a prosecution expert, defense counsel asked a hypothetical question concerning a gasoline can which had born the brunt of the fire and was told that at least some remnants of it would remain. (R. 1112) Thus, the jury could determine for itself whether they thought this gasoline can could have been in the second floor hallway of the burned out building during the fire.

But the condition of the can, and Petitioner's trying to draw from the alleged existence of a fingerprint report which was supposedly lost that the fingerprint evidence would have been favorable to the defense are two entirely different matters. Certainly, there would be no reason to remand this case for a new trial.

In spite of all of Petitioner's arguments to the contrary, it is clear here that this case was properly decided by the Illinois Supreme Court on the basis of well established cases from this Court; and that the "bad faith" test was properly applied here. Since the decision reached by Illinois' highest court is correct on the record, and in complete conformity with applicable decisions of this Honorable Court, there had been no reason presented why this Court should undertake to review the decision of the Illinois Supreme Court in this case. On the contrary, clearly here Certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, the Respondent respectfully prays that this Honorable Court deny the instant Petition For Writ of Certiorari.

Respectfully submitted,

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